

¹ Claimant and his father are referred to in this way to protect their confidentiality.

find a provider and did not wish to use agency respite.

2. In a letter sent on May 30, 2006, the Service Agency denied the Claimant's parents' request for an adapted tricycle for Claimant. (Exhibit E.)

3. Claimant's father submitted a request for Fair Hearing dated June 7, 2006 (Exhibit B), and this hearing ensued.

4. On March 22, 2006, Claimant's father spoke with the service coordinator for Claimant and requested a specially adapted tricycle to assist in developing motor skills. Claimant was using such a tricycle at his school.

5. The service coordinator contacted the school the next day and learned of the specific type of tricycle and that Claimant had just started to use it at school. The service coordinator wrote a note indicating that she spoke to the program manager about the issues. The note stated specifically: "Discussed community integration and the bike allowing [Claimant] to access the community with his family when they are bike riding." (Exhibit H, note dated 3/23/06.) In another note, dated 3/24/06, the service coordinator wrote that Claimant's mother told her that, for a long time, Claimant "has watched his family members and other kids in the community ride their bicycles yet has never been able to participate."

6. The service coordinator sought input from Pam Hellman, the Service Agency's occupational therapy consultant. Ms. Hellman reviewed records, including an occupational therapy note in Claimant's Individual Education Plan (IEP) with the school district (Exhibit J), and consulted with the service coordinator and a program manager. Ms. Hellman also wrote a note, indicating that Claimant required assistance to remain focused during adaptive physical education at school, and had a very short attention span. He had difficulty following directions. Further, the IEP noted that Claimant "demonstrated functional range of motion, strength and postural stability." Ms. Hellman determined that, based on Claimant's presentation, the tricycle was not clinically indicated and would be more "for enrichment." (Exhibit H, note dated 5/1/06.)

7. Ms. Hellman intended to observe Claimant in his use of the tricycle during summer school. Among other things, she wanted to see if Claimant was interested in using the tricycle and to what extent he could control it. However, no observation has occurred. Claimant was enrolled in summer school but was not attending. His father was going to bring Claimant to the school on a day when Ms. Hellman was available. However, when Ms. Hellman called the school to make arrangements, she was told that Claimant was not attending summer school and that there no adaptive physical education teacher had yet been assigned to the summer school session. Ms. Hellman did not communicate this to Claimant's father, who intended to make arrangements for Claimant to use the bike at school so she could observe. As a result of these miscommunications and misunderstandings, Ms. Hellman has not observed Claimant using the tricycle. In fact, she has never observed Claimant.

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8. In her testimony, Ms. Hellman indicated her concerns about Claimant's clinical need for a tricycle and whether Claimant could exercise the judgment and skill necessary to safely use the tricycle. In her experience, tricycles had been purchased only when there was a need, beyond those identified in an IEP, which was supported by a recommendation of a physical therapist or occupational therapist. Also, in those instances, the tricycle had already been in use over time and was found to be effective. Ms. Hellman testified that, when she concluded that the tricycle would be an "enrichment" for Claimant, she meant that there was no established clinical or medical need for it; however, the activity would add to someone's quality of life. Ms. Hellman believes it would be helpful for her to consult with Claimant's adaptive physical education teacher and to observe Claimant using the tricycle at school.

9. The school IEP occupational therapy note relied upon by Ms. Hellman was prepared for an IEP meeting on January 19, 2006, long before Claimant began using the adapted tricycle at school. It is clear from reviewing the note (Exhibit J), that one of the foundations for the observations and conclusions therein is the extent to which Claimant's condition affects his ability to access his educational program. Further, the note indicates that, although Claimant has made some progress over the years, he has not been successful in meeting his goals by the end of each school year.

10. The service coordinator attended an IEP meeting in May 2006. The IEP (Exhibit G) notes that Claimant will use the tricycle at school to improve lower body strength and muscle tone.

11. In the letter denying the tricycle (Exhibit G), the service coordinator stated the reasons for denial are: that the school district is providing a tricycle at school, and that the Service Agency is "prohibited from providing support service when there is an identified community resource to provide it, namely [the school district]"; further, due to Claimant's level of cognitive functioning, "he would be unable to safely navigate the community on a tricycle independently."

12. Claimant's father testified that Claimant is able to follow instructions sufficiently, and that his teacher at school has observed this. He contends that, as Claimant is not meeting the goal for use of the tricycle as set forth in the IEP, additional use of the bicycle would be of benefit.

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CONCLUSIONS OF LAW AND DISCUSSION

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law and determination of issues:

1. Throughout the applicable statutes and regulations (Welfare & Institutions Code sections 4700 - 4716, and California Code of Regulations, title 17, sections 50900 - 50964)², the state level fair hearing is referred to as an appeal of the regional center's decision. Particularly in this instance, where Claimant seeks to obtain a service not presently provided, Claimant has the burden of proof to establish that he is entitled to the service he seeks.

2. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an Individual Program Plan (IPP) designed to promote as normal a life as possible. (§ 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646; 4646.5, subds. (a)(1), (a)(2) and (a)(4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., Code §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (Code §§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

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² All statutory references are to the Welfare and Institutions Code, except where indicated.

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3. Section 4512, subdivision (b), of the Lanterman Act states in part:

“‘Services and supports for person with developmental disabilities’ means specialized service and supports or special adaptations of generic services and support directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer’s family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . physical, occupational, and speech therapy, . . . education, . . . recreation, . . . adaptive equipment and supplies, . . . community integration services”

4. Services provided must be cost effective (Code § 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., Code §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) A fair reading of the law is that a regional center is not required to meet a consumer’s every possible need or desire, in part because it is obligated to meet the needs of many children and families.

One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed in many different ways in the Lanterman Act. Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (§ 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791).

5. The Individuals with Disabilities in Education Act (20 U.S.C. section 1400 et seq.) (IDEA) is a federal law that provides funding for education programs for disabled students in states that choose to participate in that federal program. California has chosen to participate. (Education Code sections 56340 – 56449.)

6. Persons with mental retardation are entitled to services under both acts. (Lanterman Act, section 4512, subdivision (a), and under IDEA (Title 20, U.S.C. section 602, subdivision (3)(b)(i)).) Both acts include “education” in listing the services to be provided to qualified persons. (Lanterman Act, section 4512, subdivision (b); IDEA, section 602, subsections (8) and (22), which define “free appropriate public education” and “related services.”) IDEA and its

special education programs are administered in California by the state's local educational agencies and school districts.

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7. Under IDEA, a school district is not required to make available to the consumer the same level of services and supports as the regional center is required to provide by the Lanterman Act. Instead of the regional centers' mandate to assist in integrating the consumer into his community, the school districts' mandate is to provide educational benefit. In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, the Supreme Court considered the level of educational services which the federal law mandated from a school district and held that

Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

8. In rendering services of education and training for persons with disabilities over the age of three years, it is the primary responsibility of the school district to use its available funds for such purpose, with ultimate responsibility for any unmet needs to be funded by the Service Agency (section 4648, subdivision (f) of the Lanterman Act; and compare IDEA, section 602(8) and (22), with Lanterman Act sections 4512, subdivision (b), 4648, subdivision (a)(8) and 4648, subdivision (f)).

9. Here, the school district maintains a program of special education for eligible children. It has offered occupational therapy services to Claimant only in the setting of adapted physical education in its school-based facilities, and no outside services. It is the school district's obligation to provide services to meet Claimant's educational needs.

10. The Service Agency has relied upon the school district's determination that the tricycle meets Claimant's educational needs. However, the Service Agency has a different standard in determining whether a consumer is entitled to a requested service. The Service Agency has not taken sufficient steps to determine if such a need exists. If Claimant has needs for occupational therapy that are not met by the school district, it may be necessary for the Service Agency to provide the service. Under such circumstances, the Service Agency would not, therefore, be precluded by section 4648, subdivision (a)(8) of the Lanterman Act from adding support for additional occupational therapy services in the form of the tricycle. Such expenditure will not "supplant" the special education budget of the school district as allocated to Claimant. Funding for this service to meet the established needs of this Claimant might therefore be the responsibility of the Service Agency (sections 4500, 4501 and 4648, subdivision (f)).

11. Further, the Service Agency has made no attempt to assess any need of Claimant for the tricycle other than a clinical or medical need, which appears to be related to the statutory

requirement to provide occupational or physical therapy. There has been no effort to address the possibility that the tricycle, as a recreational service, community integration service, or adaptive equipment, would address other needs that may be within the responsibility of the Service Agency. These three areas of service are specifically, and separately, set forth in section 4512, subdivision (b), as the types of services and supports that are the responsibility of the Service Agency. It must be noted that Claimant's parents have not obtained any independent assessments or evaluations to establish such a need. However, the Service Agency should make an assessment as part of its duty to identify Claimant's needs and the available services.

Under the circumstances of this case, time is needed for Claimant to begin the next school year (presumably in early September), and for him to use the tricycle in his adapted physical education class, and for the Service Agency to observe Claimant at this activity and seek the input of teachers and/or other knowledgeable personnel from the school district. To do so, the Service Agency will be given until the end of September to make such assessment, and another 15 days to convene an IPP meeting to discuss the need for the requested service.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Claimant's appeal of the Service Agency's determination to deny the specially adapted tricycle is granted, in part, and denied, in part. By the end of September 2006, the Service Agency shall perform an assessment of Claimant's need for the service, as more specifically set forth in the Decision. By October 16, 2006, the Service Agency and Claimant's parents shall convene an IPP meeting to discuss the outcome of the assessment and the need for the requested service.

DATED: July 26, 2006.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

Notice: This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.